HONG LEONG FINANCE BHD.

v.

PASIR PERMATA SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT NO. C23-2072-86]
6 JANUARY 1989

CIVIL PROCEDURE: *Application to set aside judgment in default of appearance - Filed one and half years after judgment - Third defendant refused to accept service of Writ - Writ brought to his attention - Good personal service - Took fresh steps by opposing a garnishee order - Precluded from objecting to setting aside judgment in default.*

This was an application by the third defendant to set aside the judgment in default of appearance against him. The application was made one and half years after the judgment was entered when a bankruptcy notice was served on him. The process server of the plaintiff went to the third defendant's office to serve the writ. The third defendant refused to see the process server or to acknowledge receipt of the writ. Thereupon the writ was served on the third defendant's secretary. Prior to the service of the bankruptcy notice on him, the third defendant had filed an affidavit to oppose a garnishee order.

Held:

[1] There was good personal service of the writ on the third defendant. The plaintiff had brought the writ to the knowledge and attention of the third defendant. It was not necessary for the process server to hand the writ personally to the third defendant.

[2] The third defendant was precluded from applying to set aside the judgment in default by virtue of O. 2 r. 2, Rules of the High Court 1980 as he had taken fresh steps in the proceedings by opposing the garnishee order.

[Application dismissed with costs.]

Legislation referred to:
Rules of the High Court 1980, O. 2 r. 2

For the applicant/third defendant - Hira Singh; M/s. Asbir, Hira Singh & Co.
For the respondent/plaintiff - B. Seth; M/s. Shearn Delamore & Co.

JUDGMENT

Siti Norma Yaakob J:

On 4 November 1986, judgment in default of appearance was entered against the 3rd defendant and the instant proceedings before me relates to his application, filed 1½ years later, to have the judgment in default set aside.

Fully aware that the delay works against his own interests, the 3rd defendant seeks to explain it by stating that he was not even aware that proceedings had commenced against him as he was not served with the writ and statement of claim and that he only came to know of the existence of the judgment when he was informed so by his solicitors. Unfortunately there is no mention when this information was relayed to him by his solicitors.

The writ and statement of claim in this suit, were filed on 12 July 1986 and from his affidavit affirmed on 27 August 1986, the process server has deposed that on that day at about 12.10 p.m. he had proceeded to the office of the 3rd defendant at Messrs. Foo Ngit Tse & Brothers Sdn. Bhd., 2nd floor, Hongkong & Shanghai Banking Corporation Berhad Chambers, Station Road, Ipoh, for the sole purpose of serving the writ and statement of claim on him. At the premises, the process server met first of all the 3rd defendant's secretary. He identified himself and explained the purpose of his visit but on being informed of this by his secretary, the 3rd defendant refused to see the process server, and his secretary referred the process server to the accountant of the company, a Mr. Tan. The process server again explained the purpose of his visit to Mr. Tan and stressed the fact that he must serve a copy of the writ statement of claim on the 3rd defendant and to nobody else. Mr. Tan took two copies of the writ and statement of claim, and instructed an office boy to take them to the 3rd defendant and to have one copy signed and acknowledged by the 3rd defendant himself. Minutes later the office boy came out of the 3rd defendant's office and informed the process server that the 3rd defendant refused to sign on the proof copy of the writ and statement of claim. Before leaving, the process server left a copy of the writ and statement of claim on the table of the 3rd defendant's secretary.

The issue is whether that is good personal service of the writ and statement of claim on the 3rd defendant.

The 3rd defendant maintains that it is not, as only his secretary had been served with the writ and statement of claim but not himself.

The whole purpose of serving a writ and statement of claim is to make a defendant aware of the fact that legal proceedings had already commenced against him and that he is entitled within the time limited in the writ, to enter an appearance and make his defence but in default of him doing so, the plaintiff may proceed to enter judgment and levy execution against him. I consider that this purpose was achieved when the office boy disappeared into the 3rd defendant's office with 2 copies of the writ and statement of claim. It is not disputed that the 3rd defendant was in office at the material time and the office boy must have handed the documents to him with directions that the 3rd defendant acknowledge on one copy. The fact that the 3rd defendant refused to do so but chose instead to play hide and seek must work to his detriment as all the process server is expected to do is to bring the writ and statement of claim to the knowledge and attention of the 3rd defendant. The fact of the acknowledgement of service is nothing more than to confirm knowledge of the existence of legal proceedings had been parted to the 3rd defendant and to avoid any possible allegation of non-service.

In this case the 3rd defendant was at his office premises but he chose to hide in the sanctuary of his office and he must have had sight of the writ and statement of claim or knew the nature of the documents that the office boy had brought for his attention. On the facts of this case, I am satisfied that there had been personal service of the writ and statement of claim on the 3rd defendant, even though the act of actual handing over by the process server and 3rd defendant's acknowledgement were not apparently present.

Reference was also made by the plaintiff to various other documents that were also served by the plaintiff on the 3rd defendant at the very same office address where the writ and statement of claim were earlier served and where no issue was taken up regarding the service of such documents. I do not consider that reference to those other documents has any relevance to the personal service of the writ and statement of claim on the 3rd defendant,

a although they confirm that the 3rd defendant can be easily contacted at his office address, quite apart from the address that had been stated in the writ and not given in the guarantee he had signed.

In this respect, my attention was also drawn to the guarantee and indemnity dated 6 February 1985 under which the 3rd defendant's liability is founded and to clause 6 which governs the manner and effect of service of the notice of demand to pay and which the plaintiff's contended would be equally applicable to service of the writ and statement of claim. This contention cannot be right as clause 6 refers only to the service of the notice of demand which is a contractual obligation whereas service of the writ and statement of claim is governed by the Rules of the High Court 1980 and as such clause 6 is inapplicable as far as service of the writ and statement of claim is concerned.

c The judgment in default was entered on 4 November 1986, and by letter dated 16 December 1986, the plaintiff's solicitors informed the 3rd defendant of the judgment and also enclosed a copy of the judgment. The AR card has been returned with the 3rd defendant's acknowledgement on it and he has not disputed this fact. This would mean that as early as December 1986, the 3rd defendant was already aware that judgment had already been entered against him but he only filed the present application on 14 June 1988, 1½ years *d* later, following service of a bankruptcy notice on him on 7 June 1988.

Prior to the service of the bankruptcy notice, a garnishee notice to show cause had also been served on him on 25 February 1988 and he had filed an affidavit dated 5 April 1988 opposing the plaintiff's application to have the garnishee order made absolute. By so doing, the 3rd defendant had taken fresh steps in the proceedings and under O. 2 r. 2(1) he is precluded from applying to have the judgment in default set aside as he is deemed to have *e* waived such right.

On the facts of this case, I was satisfied that the judgment in default had been obtained regularly and on that finding I had dismissed the 3rd defendant's application with costs.

Also found at [1989] 1 CLJ 939

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